DEC 2 3 1973 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-835

T. J. CLARK, ETC., ET AL,
Petitioners,

v.

MARILYN WHATLEY AND CAROL GERBER,
Respondents.

MOTION BY LE ROY E. SYMM, VOTER REGISTRAR OF WALLER COUNTY, TEXAS, FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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FIDELITY PRINTING COMPANY, HOUSTON

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To the Honorable Supreme Court of the United States:

LE ROY E. SYMM, as Amicus Curiae, presents this Motion for Leave to File a Brief of Amicus Curiae in Support of Petition for Writ of Certiorari. Although Counsel for Petitioners have consented to the filing of this Brief, Counsel for Respondents have refused to consent to the filing of such Brief.

NATURE OF APPLICANT'S INTEREST

Le Roy E. Symm is Tax Assessor and Collector for Waller County, Texas, and, as such, is by law the voter registrar of Waller County. Symm's duties as voter registrar include determining whether or not an applicant for

a voter registration certificate in Waller County is a resident of Waller County, according to the provisions of Article 5.08 of the Texas Election Code.

The Courts below in the instant case have held unconstitutional the subsection of Article 5.08 dealing with students, that being Article 5.08(k). Prairie View A & M University is located in Waller County, and students at that university have applied to register to vote in Waller County. Symm's method of determining whether such students are residents of Waller County has been attacked in the Courts, and the case of *Ballas* v. *Symm* is now pending in the Court of Appeals for the Fifth Circuit (No. 73-1325 on the docket of such Court). A portion of the argument advanced by Ballas in the Court of Appeals is the same as the holdings of the Courts below in the instant case. The statute declared unconstitutional in the instant case is the same statute involved in *Ballas* v. *Symm*.

QUESTIONS OF LAW RELEVANT TO THE DISPOSITION OF THIS CASE

As a voter registrar in Texas, Symm, if this Motion is granted, will attempt in his Brief to demonstrate to the Court important questions of law involved in this case from his viewpoint as a public official who must apply the law in individualized situations.

These important factors must be emphasized:

(1) Because of the holdings of the Courts below, it is virtually impossible for any voter registrar in Texas to know how to treat a student voter applicant.

In declaring unconstitutional Article 5.08(k) of the Texas Election Code, the Courts below left *undisturbed* the remainder of the Texas statute. Applying the untouched rules concerning residence to student applicants *should*, under the law, result in students having the same residence for

voting purposes as if Article 5.08(k) had not been declared unconstitutional. However, since the Courts below undoubtedly intended their rulings to have some effect, *that effect could only be that students are now being placed in a special, artificial category for determining voter qualifications.* All other voter applicants must be residents of the relevant political subdivision; students, for all practical purposes, need not be.

(2) The opinions of the Courts below give voter registrars no guides as to what rules to follow in considering student voting applications. One of the defendants in the Courts below was a voter registrar. The declaratory judgment of the single-judge District Court (which was affirmed by the Court of Appeals) *did not state* that he was to register students attending college in the county in which he is the registrar. It set no requirements as to what other portions of the Texas law the registrar could or should apply to student applicants. No injunction was granted (nor could have been granted) and no guide was given for future actions to be taken by the registrar in this lawsuit or by Symm or by any other voter registrar.

(3) What has been stated above leads to the third question:

The single-judge District Court did *not* order any voter registrar *to do anything.* The Court simply declared a portion of a statute unconstitutional (without the convening of a three-judge court). The District Court *cannot* enforce its judgment. It could only enforce its judgment by injunction, and it has no authority to issue an injunction to enforce *this* judgment, since to do so would circumvent the three-judge statutory scheme. *The question then is:* If the complaint filed by Respondents upon which the District Court entered its judgment, could only result in a declaratory judgment which cannot be enforced, did the complaint state a cause of action upon which relief could be granted?

All these questions are relevant to the disposition of this case, and to the performance of Symm's statutory duties of office.

WHEREFORE, PREMISES CONSIDERED, Symm prays that this Motion be granted, and Symm be granted leave to file his Brief in Support of Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Will Sears, one of the attorneys for the Amicus Curiae, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of this Motion have been served on Petitioners by sending three copies thereof to Mr. Sam L. Jones, Jr., Assistant Attorney General for the State of Texas, Post Office Box 12548, Capitol Station, Austin, Texas, 78711, and to Respondents by sending three copies to Mr. David R. Richards, Clinton & Richards, 600 West 7th Street, Austin, Texas, 78701, by placing them in the United States Postal Service with sufficient first class postage attached thereto this ..... day of December, 1973.

.....
Will Sears